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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 203

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THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY, APPELLANTS,

vs.

THE CITY OF NEWPORT, KENTUCKY.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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FILED JANUARY 18, 1921.

(28,044)

# (28,044)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1920.

# No. 687.

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*vs.*

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1921.

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1 Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at Federal Court Hall, in the City of Covington, Ky., on Monday, October 18th, A. D. 1920, and of our Independence the 145 year.

Court met.

Present:

Hon. A. M. J. Cochran, Judge.

No. 3123.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, and The Suburban Electric Company, a Corporation under the Laws of Kentucky, Plaintiffs,

vs.

THE CITY OF NEWPORT, a Municipal Corporation under the Laws of Kentucky, Defendant.

2 *Bill in Equity.*

Filed Nov. 30, 1917.

United States District Court, Eastern District of Kentucky, at Covington.

#3123.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, and The Suburban Electric Company, a Corporation under the Laws of Kentucky, Plaintiffs,

vs.

THE CITY OF NEWPORT, a Municipal Corporation under the Laws of Kentucky, Defendant.

Plaintiffs are corporations organized under special charters of the Commonwealth of Kentucky. Defendant, the City of Newport, is a municipal corporation of the second class under the laws of Kentucky, and located in said Eastern District of Kentucky.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and arises under the Constitution of the United States in the manner hereinafter set forth.

Plaintiff, the South Covington & Cincinnati Street Railway Company, was organized and now exists under an act of the General

Assembly of the Commonwealth of Kentucky approved June 25, 1876, entitled "An Act to incorporate the South Covington & Cincinnati Street Railway Company;" by the said act of incorporation said company was created a body politic and corporate, with perpetual succession and power to construct, own, hold, operate and maintain a line or lines of street railway in said city of Newport and in the vicinity thereof along and over such streets and public ways in said
3 city as the City Council should grant the right of way to plaintiff, the South Covington & Cincinnati Street Railway Company; by the terms of said charter defendant, the City of Newport, was expressly authorized and empowered to grant to plaintiff, the South Covington & Cincinnati Street Railway Company, the right of way over all the streets and public ways of said city.

Defendant, the City of Newport, by ordinances duly passed October 3, 1867, and May 19, 1881, granted to the Newport Street Railway Company, a corporation under the laws of Kentucky, the perpetual privilege of constructing and operating street railways on, over and along the following streets in the City of Newport: Hubbard Street, Madison Street, York Street, Williamson Street, Washington Avenue, Eglantine Street, Saratoga Street and Taylor Street. Said ordinances were duly accepted by said Newport Street Railway Company, which constructed and operated said lines in accordance with the terms of said ordinances, and on February 11, 1882, conveyed said grants to plaintiff, the South Covington & Cincinnati Street Railway Company, which has since said conveyance been the owner and holder thereof and has maintained and operated street railway lines on the streets therein named.

The Newport & Dayton Street Railway Company was incorporated by an act of the General Assembly of the State of Kentucky approved January 25, 1868, with perpetual succession and power, with the consent of the City Council of Newport, to construct and
4 operate a street railway line on such streets in the City of Newport as might be agreed upon. Defendant, the City of Newport, by ordinance of April 14, 1887, granted to said Newport & Dayton Street Railway Company the perpetual right to construct and operate a street railway line from the corporate limits of the City of Newport on Main and Front Streets to the corner of York and Front Streets, with double or single track. Said ordinance was duly accepted by said Newport & Dayton Street Railway Company, which constructed and operated a street railway line in accordance with the terms thereof. By act of the General Assembly of the State of Kentucky approved April 26, 1886, amending the charter of said Newport & Dayton Street Railway Company, said company was given the perpetual right to run its line of street railway over the streets of the City of Newport by way of the Newport and Cincinnati Railroad Bridge to Fifth Street in the City of Cincinnati, Ohio. Under the terms of said act said Newport & Dayton Street Railway Company constructed and operated the street railway line on Front Street in the City of Newport, and when said approach to said bridge was extended to Third Street in the City of Newport, said company, with the consent of the city, removed its line from Front Street to Third

Street, and thereafter maintained and operated its line on Third Street under the authority of said act of the General Assembly. Said Newport & Dayton Street Railway Company, being duly authorized thereunto by the act incorporating it, conveyed to plaintiff,
5 the South Covington & Cincinnati Street Railway Company, its said rights and franchises in the City of Newport, and plaintiff has since said time owned and held said franchises and maintained and operated a street railway line on said routes.

Defendant, the City of Newport, by ordinance passed on or about July 18, 1906, granted to plaintiff, the South Covington & Cincinnati Street Railway Company, a franchise for the period of twenty years, to operate its street railway lines over and upon the following streets in the City of Newport, to-wit: Brighton Street from the entrance to the Newport and Covington Bridge to Fifth Street; Fifth Street from Brighton to Monmouth; Monmouth from Fifth to Third Street; Third Street from Monmouth to York; Third Street from Monmouth to Saratoga and the entrance to the Louisville & Nashville Bridge; York Street from Third to Fifth Street.

Plaintiff, the South Covington & Cincinnati Street Railway Company, is also the owner of a perpetual right of way to maintain and operate a street railway line on Beech Street, from Front to Third Street, in the City of Newport, by virtue of a deed from the owners of said street prior to the time of its dedication to the City of Newport.

Under and by virtue of said grants plaintiff has maintained and operated, and is now maintaining and operating street railway lines upon said streets and has invested large sums of money in the construction and maintenance thereof. Plaintiff, the South Cov-
6 ington & Cincinnati Street Railway Company, is now engaged in the through operation of cars from points in Cincinnati, Ohio, to points in Newport, Covington, Bellevue, Dayton and Ft. Thomas, Kentucky, whereby passengers are transported in intercity and interstate commerce between said points for one fare and without change of cars.

The Suburban Electric Company is a corporation under the laws of Kentucky formed by the consolidation on or about April 11, 1894, of The Covington Electric Company of Covington, Ky., The Suburban Electric Illuminating, Heating and Power Company of Newport, Ky., and The Citizens' Electric Light Company, of Dayton, Ky.

The Edison Electric Illuminating, Heating & Power Company, of Newport, Ky., was incorporated by an Act of the General Assembly of Kentucky on or about April 9, 1890, and by the terms of said act was authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, light and heat in, under, on and over the streets, alleys and highways of said city and adjacent thereto. By an amendatory act of the General Assembly of Kentucky the word "Edison" wherever it appeared in said act last mentioned, was struck out and the word "Suburban" inserted.

On or about June 19, 1890, defendant, the City of Newport, passed an ordinance entitled "An Ordinance granting a right of way to the

Suburban Electric Illuminating, Heating & Power Co. to erect poles and wires upon the streets, lanes, alleys and other public
7 places in the City of Newport, Ky. for the purpose of supplying electric light, heat and power." By the terms of said ordinance and said Act of the General Assembly said Company was authorized and empowered in perpetuity to use all the streets, lanes, alleys and other public thoroughfares in the City of Newport for the purpose of erecting poles, laying conduits, maintaining and operating electric light wires, mains and apparatus for the distribution of electricity for light, heat and power, or either.

It was provided in said ordinance that said Company in placing said poles should erect them under the supervision of the city engineer or whomsoever the Board of Councilmen should appoint for the purpose.

Thereafter the said Company erected, constructed and maintained a plant for the production of electricity and a system of poles and wires for the distribution thereof in the City of Newport as provided in said ordinance.

Thereafter, namely on or about the 11th day of April, 1894, the said Suburban Electric Illuminating, Heating & Power Company of Newport, Ky., was consolidated with the other companies above mentioned into The Suburban Electric Company, plaintiff herein, which thereupon became the owner of the said plant for the production of electricity and the system of poles and wires for the distribution thereof. Said Suburban Electric Company has since said time owned and maintained and now owns and maintains said plant and system in said City of Newport.

8 Plaintiff, The South Covington and Cincinnati Street Railway Company, is the owner of a power house in said City of Newport wherein electric current is manufactured; that a portion of the machinery in said power house belongs to plaintiff, The Suburban Electric Company, and that by contract between said companies the electric current for the operation of the street railway system of the plaintiff, The South Covington & Cincinnati St. Ry. Co., and for the supply of the customers of the plaintiff, The Suburban Electric Co. is, and was at the times hereinafter mentioned, manufactured in said power house.

That owing to the increased demand for electric current for the uses of the plaintiffs and to the limited capacity of said power house, it was deemed advisable and necessary that said companies should arrange for the purchase of additional electric current from The Union Gas & Electric Company in the City of Cincinnati, Ohio, immediately across the Ohio River from said City of Newport, Ky. For the purpose of transmitting said electric current it was necessary that a wire should be constructed and maintained from said power house, located on Eleventh Street and the Licking River, to the Newport end of what is known as the Central Bridge in the City of Newport near Third and York Streets in said city.

That on or about the 3d day of February, 1915, plaintiffs erected poles and installed such a wire from the Newport end of said Central

Bridge to said power house over the following route in said
9 City of Newport, to-wit: From the Newport end of the Central Bridge along First Street to Central Avenue; thence south on Central Avenue to Third Street; thence west on Third Street to Patterson; south on Patterson to Fourth Street; west on Fourth Street to Brighton, thence along Brighton to an alley between Ninth and Lindsay Streets; thence along said alley to Lowell Street; thence along Lowell Street to a point opposite the power house; thence to said power house aforesaid. Said route is on the edge of said City of Newport in the less thickly populated part of said city and said wire was installed at a height from 30 to 50 feet above the ground, carried on porcelain insulators securely fastened and that there are no wires above it. Said poles were located and said wire installed under the supervision and direction and with the assent of the City Engineer or Commissioner of Public Works of the City of Newport.

Said power house above referred to is located near the Licking River where at times it is invaded by flood from said river and from the Ohio River interfering with the operation of the machinery in said power house generating electrical current with which to operate the street cars and furnish electric light and power to said city. The electricity obtained from said special wire above described is not interrupted by said flood conditions and it is a great advantage to said City of Newport and its inhabitants and to plaintiffs to have such additional or supplementary source of electric current which will not be disturbed by flood conditions. It is a further advantage
10 to said City of Newport and to its inhabitants and to said plaintiffs to have such independent and supplementary source of supply in the event of any accident at said power house interfering with the production of electricity therein.

Said wire was erected at an expense for said wire alone of more than $8,000 and including the machinery for the use thereof not less than $20,000.

Plaintiffs say that on November 20, 1917, the Board of Commissioners of the City of Newport adopted a resolution, a copy of which is hereto attached marked Exhibit A, reciting that said wire is dangerous to life and property and directing plaintiff, The South Covington & Cincinnati Street Railway Co. to remove the same not later than December 1, 1917, said resolution having been offered by Joseph G. Hermann, Commissioner of Public Works

Plaintiffs say that unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs injury which cannot be compensated in money and to their irreparable damage.

Plaintiffs say that it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article 1, Section 10 of the Con-
11 stitution of the United States and is a taking of plaintiffs'

property without due process of law in violation of the 14th Amendment to said Constitution of the United States.

Wherefore, plaintiffs pray that the court decree said resolution of November 20, 1917, as aforesaid to be null and void and that the City of Newport, its officers, agents and employees be enjoined by restraining order, preliminary injunction and final decree from enforcing, or taking any steps to enforce said resolution.

Plaintiffs further pray that they may have a writ of subpœna to defendant, commanding defendant to appear before this court and answer this bill of complaint, but not under oath, its answer under oath being hereby waived, and also a writ of injunction, enjoining and restraining the defendant, its officers and agents as hereinbefore prayed, and that plaintiffs may have such other and further relief as the nature of the case may require and as it would be entitled to in equity and in good conscience.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
THE SUBURBAN ELECTRIC COMPANY,
By MATT HEROLD,
ERNST, CASSATT & COTTLE,
*Attorneys for Plaintiffs.*

MATT HEROLD,
ERNST, CASSATT & COTTLE,
*Solicitors for Plaintiffs.*

STATE OF OHIO,
*County of Hamilton, ss:*

Polk Laffoon, being duly sworn, says that he is the Secretary of each of the plaintiffs and that the facts stated and allega-
12 tions made in the foregoing bill are true.

POLK LAFFOON.

Sworn to before me and subscribed in my presence this 28th day of November, 1917.

My notarial commission expires August 11, 1920.

[SEAL.] GEORGE STUGARD,
*Notary Public in and for said County & State.*

*Exhibit A.*

Filed Nov. 30, 1917.

Whereas the South Covington and Cincinnati Street Railway Compainy maintain a high tension wire extending from the Central Bridge at Front Street in the City of New Port, Kentucky, to the power house of said company at Eleventh and Brighton Street in Newport, and

Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and

Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens, be it

Resolved by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1st, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.

Adopted by the Board of Commissioners November 20th, 1917.

Attest:

ARTHUR ROTH,
*Recorder.*

13 *Spa. in Ch'y.*

Issued Nov. 30, 1917.

The President of the United States of America to the City of Newport, a Municipal Corporation Under the Laws of the State of Kentucky, Greeting:

You are hereby commanded to appear before our District Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Covington to answer a Bill in Equity exhibited against you in our said Court, by The South Covington & Cincinnati Street Railway Company and The Suburban Electric Company which you shall in nowise omit, under the penalty of the Law.

Witness the Honorable A. M. J. Cochran, Judge of the District Court of the United States of America, for the Eastern District of Kentucky, and the seal of our said District Court hereto affixed, at the Clerk's Office of said Court, at Covington this 30″ day of Nov. A. D. 1917 and in the 142 year of our Independence.

Attest:
[SEAL.]

J. W. MENZIES,
*Clerk,*
By M. VAN D. BELL,
*His Deputy.*

NOTE.—Answer or other defense is required to be filed in the Clerk's Office on or before the twentieth day after service, excluding the day thereof; otherwise, the bill may be taken pro confesso.

14 Spa. in Ch'y issued Nov. 30, 1917, returned and filed Dec. 7, 1917 with the following endorsement:

Received at Covington, Ky. Dec. 1, 1917. Executed by delivering a true copy to A. J. Livingston, Mayor of Newport, Ky. & to Joseph G. Herman, Commissioner of Public Works for Newport, Ky. Dec. 1, 1917.

R. C. FORD,
*U. S. Marshal,*
By T. S. ARTHUR,
*D. M.*

*Motion for a Preliminary Injunction.*

Filed Nov. 30, 1917.

Now come plaintiffs and move the court for a preliminary injunction in accordance with the prayer of the bill herein.

MATT HEROLD,
ERNST, CASSATT & COTTLE,
*Attorneys for Plaintiffs.*

*Affidavit.*

Filed Nov. 30, 1917.

Matt Herold, being duly sworn, says that he is one of the attorneys for the plaintiffs; that he has attempted to give notice of the application for a preliminary injunction to the City Solicitor of Newport but that he is absent from the City of Newport and that affiant has been unable to give such notice; that irreparable loss, damage and injury will result to plaintiffs before notice of the motion for a preliminary injunction can be served and a hearing had thereon.

MATT HEROLD.

Sworn to before me and subscribed in my presence this 30th day of November, 1917.

J. W. MENZIES,
*Clerk*
By D. M. MITCHEL,
*D. C.*

*Temporary Restraining Order.*

Entered & Filed November 30, 1917.

This cause coming on to be heard on the verified bill of the plaintiffs and on the motion for a preliminary injunction and upon the affidavit of Matt Herold, one of the attorneys for plaintiffs, and it appearing to the court that irreparable injury, loss and damage would result to plaintiffs before notice of said motion could be served and a hearing had thereon, as set forth in the bill and in said affidavit;

It is ordered that the defendant, its officers, agents and employees are restrained and enjoined, pending the further order of this court, from enforcing, or attempting to enforce, in any manner the resolution of the Board of Commissioners of the City of Newport of November 20, 1917, referred to in the bill, or from interfering in any manner, directly or indirectly, with the wire described in the bill and in said resolution.

Said motion for a preliminary injunction is set for hearing at Maysville, Ky. on the 7th day of December, 1917, at 2 o'clock P. M.

16 The amount of the injunction bond is fixed at $1,000 and now come the plaintiffs and offer their bond in said sum with American Surety Company of New York as surety, which said bond is hereby approved.

A. M. J. COCHRAN,
*Judge.*

Nov. 30, 1917.

Certified copy of Temporary Restraining Order entered & filed Nov. 30th, 1917, placed in the hands of the Marshal, and afterwards, towit, on Dec. 7, 1917, was returned & filed, endorsed as follows:

Received at Covington, Ky., Dec. 1, 1917. Executed by delivering a true copy to A. J. Livingston, Mayor of Newport, Ky. & to Joseph G. Herman, commissioner of Public Works for Newport, Ky.

R. C. FORD,
*U. S. Marshal.*
By T. S. ARTHUR,
*D. M.*

*Consent Order.*

Entered & Filed Dec. 7, 1917.

By agreement of the plaintiffs and the defendant, the hearing of the motion for a preliminary injunction is continued to December 18th, 1917, at Catlettsburg, Kentucky, and the restraining order issued herein on November 30th, 1917, is to remain in force pending the hearing of said motion.

A. M. J. COCHRAN,
*Judge.*

17 *Consent Order.*

Entered & Filed Dec. 17, 1917.

By agreement of the plaintiffs and the defendant the hearing of the motion for a preliminary injunction herein is continued to January 11th, 1918, at Covington, Ky. or if the court cannot hear said motion on said day, or either of the parties are unable to be present on said day, then the hearing shall be continued to the following week at Maysville, Ky., or to such time and place as may be convenient to the court and the restraining order issued herein on November 30th, 1917, is to remain in force and effect pending the hearing of said motion.

A. M. J. COCHRAN,
*Judge.*

Dec. 17, 1917.

*Motion.*

Filed Feb. 8, 1918.

Now comes the defendant, the City of Newport and moves for leave to file its answer herein.

BRENT SPENCE,
*Counsel for Defendant.*

*Order.*

Entered & Filed Feb. 8, 1918.

On motion of the defendant it is now ordered that the answer offered be and the same is now filed and noted of record.

A. M. J. COCHRAN,
*Judge.*

18 *Answer of Defendant.*

Filed Feb. 8, 1918.

The defendant, the City of Newport, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill comes and answers thereto or so much thereof as it is advised is material to be answered and says, that it denies that the City of Newport by ordinance passed October 3, 1867 or May 19, 1891, granted to the Newport Street Railway Company, a corporation under the laws of Kentucky, the perpetual privilege of constructing or operating street railway lines on the following and along the following streets in the City of Newport: Hubbard Street, Madison Street, York Street, Williamston Street, Washington Avenue, Eglantine Street, Saratoga Street, or Taylor Street or that it granted to the Newport Street Railway Company perpetual privilege of operating on or along any of said streets or any part thereof; denies that any ordinances granting any perpetual privileges were duly accepted by the said Newport Street Railway Company, or that it constructed or operated said lines in accordance with the terms of said alleged ordinance; denies that on February 11, 1882 or at any other time it conveyed any perpetual privilege to the plaintiff, The South Covington & Cincinnati Street Railway Company, or that said company has since said conveyance been the owner or holder thereof, or has maintained or operated street railway lines on all the streets therein mentioned.

Defendant denies that the City of Newport by ordinance of April 14, 1887, granted to said Newport & Dayton Street Railway
19 Company the perpetual right to construct or operate a street railway line from the corporate limits of the City of Newport on Main or Front Streets to the Corner of York and Front Street with double or single track.

Defendant denies that the Newport & Dayton Street Railway Company constructed or operated a street railway line in accordance with the terms of any ordinance granting it any perpetual rights.

Defendant denies by an Act of the General Assembly of the State of Kentucky approved April 26, 1886, amending the Charter of said Newport & Dayton Street Railway Company, said company was given the perpetual right to run its line of street railway over the streets of the City of Newport, by way of the Newport & Cincinnati Railroad Bridge to Fifth Street in the City of Cincinnati, Ohio; denies that under the terms of said Act said Newport & Dayton Street Railway Company constructed or operated the street railway line on Front Street in the City of Newport, or when said approach to said bridge was extended to Third Street in the City of Newport, said Company with consent of the city, removed its lines from Front Street to Third Street or thereafter maintained or operated its lines on Third Street under authority of the said Act of the General Assembly.

Defendant denies under or by virtue of the grants set up in the bill herein plaintiff has maintained or operated, or is now maintaining or operating street railway lines set forth in the bill

20 Defendant says it has no knowledge or information as to whether or not The Newport & Dayton Street Railway Company conveyed all of its alleged rights or franchises in the City of Newport to The South Covington & Cincinnati Street Railway Company.

Defendant denies that the Edison Electric Illuminating Heating & Power Company was authorized by an Act of the General Assembly of Kentucky on or about April 9, 1890 or at any other time subject to the same regulations or restrictions imposed by the City of Newport upon other corporations in said City, or at all, to run its lines, wires or conduits for electric power, light or heat under or over or along said streets, alleys or highways in said City, or adjacent thereto, or that any of said alleged rights were acquired by the Suburban Electric Company by striking out from said Act the word "Edison" or inserting in lieu thereof the word "Suburban."

The defendant, the City of Newport, denies that by an ordinance dated June 19, 1890, or any other time, The Suburban Electric Illuminating, Heating & Power Company was granted a right of way to erect poles or wires upon the streets, lanes, alleys or other public places in the City of Newport for the purpose of supplying electric light, heat or power; denies that by said ordinance or said Act of the General Assembly of Kentucky The Suburban Electric Illuminating Heating & Power Company was authorized or empowered in perpetuity to use any of the streets, lanes, alleys or other public thoroughfares in the City of Newport for the purpose

21 of erecting poles, laying conduits, maintaining or operating electric light wires, mains or apparatus for the distribution of electricity for light, heat or power or any of them.

Defendant says it has no knowledge or information upon which to found a belief as to whether or not The Suburban Electric Illuminating, Heating & Power Company on or about the 11th day of

April, 1894, or at any other time, was consolidated with the other companies mentioned in the Bill herein into The Suburban Electric Company or that it thereupon became the owner of said plant for the production of said electricity, and the poles and wires for the distribution thereof, or whether said Suburban Electric Company has since said time owned or maintained or now owns or maintains said system in said City of Newport.

It says it has no knowledge or information upon which to found a belief as to whether or not the said Suburban Electric Company has since said time owned or maintained, or now owns or maintains said plant or system in said City of Newport.

Defendant says that it has no knowledge or information upon which to found a belief as to whether or not The South Covington & Cincinnati Street Railway Company is the owner of a power house in said City of Newport wherein electric current is manufactured, or whether a portion of said machinery in said power house belongs to plaintiff, The Suburban Electric Company, or whether or not by contract between said companies the electric current for the
22 operation of said street railway system of plaintiff, The South Covington & Cincinnati Street Railway Company, or for the supply of the customers of plaintiff, The Suburban Electric Company, is or was at all the times herein mentioned, manufactured in said power house.

Defendant says it has no knowledge or information upon which to found a belief whether or not owing to the increased demand for electric current for the uses of plaintiffs, or to the limited capacity of said power house, it was deemed advisable or necessary that said company should arrange for the purchase of additional electric current from the Union Gas & Electric Company in the City of Cincinnati, Ohio, immediately across the Ohio River from the City of Newport, or whether or not for the purpose of transmitting said electric current it was necessary that a wire should be constructed or maintained from said power house located on Eleventh Street and the Licking River to what is known as the Newport End of the Central Bridge in said City.

Defendant says that it is informed and believes that frequently no current is generated in said power house in the City of Newport, described in the bill, and that the current both for light and heat and for the purpose of propelling the cars of The South Covington & Cincinnati Street Railway Company is generated in the City of Cincinnati and conveyed to the City of Newport by the high tension wire complained of herein.

Defendant denies that said route described in the petition
23 over which plaintiff erected its said poles and installed its said wire, viz., from the Newport end of the Central Bridge along First Street to Central Avenue; thence south on Central Avenue to Third; thence west on Third to Patterson, south on Patterson to Fourth Street, west on Fourth Street to Brighton; thence along Brighton to an alley between Ninth and Lindsey Streets; thence along said alley to Lowell Street; thence along Lowell to a point opposite the power house; thence to said power house aforesaid, is on the edge of

the said City of Newport, or in the less thickly populated part of said City; denies that said poles were located or said wire installed under the supervision or direction or with the assent of the City Engineer, or Commissioner of Public Works of said City of Newport.

Defendant denies that said power house is at times invaded by floods of the Licking or from the Ohio River; interfering with the operation of said machinery in said power house with which to operate the street cars or furnish electric light and power to said City. Defendant admits that said power house has been invaded by the high waters of the Licking and Ohio Rivers but that said floods are exceedingly infrequent and have not occurred in many years.

Defendant denies that the electricity obtained from the said special wire described in the bill is a great advantage to the City of Newport or its inhabitants, or that it is an advantage to the City or its citizens to have such alleged additional or supplementary sup-
24 ply in the event of any accident at said power house interfering with the production of electricity therein.

Defendant says that there are other wires on the poles beneath said wire described in the bill, and that said wire carries an electric current of very high voltage and is dangerous to the lives of the citizens and inhabitants of the City of Newport and to the property located therein, and that plaintiffs erected said poles and said wire and maintain same without right or authority, and that plaintiffs or either of them never received any permission or authority from the City of Newport or the Board of Commissioners of the City of Newport to erect said poles or wire, and the City Engineer and the Superintendent of Public Works never pretended to grant any right or authority to plaintiffs, or either of them, to erect said poles or maintain said wire; nor did the City Engineer or the Superintendent of Public Works ever have any authority to grant said permission to erect said poles or wire described in the bill. There is nothing on record in the City of Newport indicating that the City of Newport or any official thereof, ever had any knowledge of the erection of said poles or the maintenance of said wire, or that the City Engineer or Superintendent of Public Works ever pretended to grant any permit to erect or maintain same.

Defendant says that said resolution of the Board of Commissioners of the City of Newport described and complained of in the
25 bill herein was passed in the exercise of the general Police Powers of the City of Newport, and that the removal of said wire was deemed by said Board of Commissioners to be necessary to secure the safety of the lives and property of the citizens and inhabitants of the City of Newport.

Defendant denies that by reason of anything alleged in the bill herein, plaintiffs have been injured or that said resolution is an impairment of any obligations of the alleged contracts set up in the bill herein, or any of them, or in violation of Article 1, Section Ten (10) of the Constitution of the United States; or is the taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of said Constitution of the United States; or is an im-

pairment of plaintiff's rights under the Constitution of the United States, or at all.

Having thus made full answer to all matters and things contained in the bill, this defendant prays to be hence dismissed with its costs.

BRENT SPENCE,
*Counsel for Defendant.*

*Order for Taking Depositions.*

Entered & Filed April 1st, 1918.

By agreement between parties it is ordered that the testimony in this case may be taken by depositions; plaintiff's depositions to be taken within 30 days from date hereof; defendant's depositions to be taken 30 days thereafter, and plaintiff's rebuttal within 15 days thereafter.

A. M. J. COCHRAN,
*Judge.*

26 *Order.*

Entered & Filed Oct. 28, 1918.

It is now ordered that this cause be and same is continued.

A. M. J. COCHRAN,
*Judge.*

*Order.*

Entered & Filed Dec. 6, 1918.

This day came the defendant and offered for filing an amended answer herein and on its motion, the court being advised, it is ordered that said amended answer be and the same is filed and noted of record.

A. M. J. COCHRAN,
*Judge.*

*Amended Answer.*

Filed Dec. 6, 1918.

The defendant, the City of Newport, reserving all manner of exceptions that may be had to the imperfections of the bill, comes now and amends its answer herein by leave of Court and says:

That the enforcement of said resolution complained of in the bill herein, and the removal of the said poles and high tension wire described in the bill, will not be attempted to be made by defendant, or any officer, or agent, or servant of said defendant, but will only be

sought by and through an order of the Campbell Circuit
27 Court, a court of competent jurisdiction, first had and obtained and after hearing, and of due and reasonable notice to all interested parties.

Defendant further answering says that this suit does not really and substantially involve a controversy properly within the jurisdiction of this Court, for that this suit is wholly based upon the alleged existence of a Federal question and that the allegations in said suit are dependent on the construction of the laws of the United States and the Constitution of the United States, and the allegation that any of the alleged facts set up in the petition constitute an impairment of the obligations of any of the alleged contracts of plaintiff in violation of Article I, Section 10 of the Constitution of the United States, or is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment to said Constitution of the United States, are not truly and in good faith made, but on the contrary the averments in the bill as aforesaid are stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court. Wherefore, defendant says that the allegations are fictitious and fraudulent and that it is apparent upon the face of the bill herein that this Court has no jurisdiction of the subject matter of the action and that no federal question is involved.

Wherefore defendant prays as in its answer herein.

THE CITY OF NEWPORT,
By BRENT SPENCE,
*Solicitor for the City of Newport.*

STATE OF KENTUCKY,
*County of Campbell, set:*

A. J. Livingston, being first duly sworn, says that he is the
28 Mayor of the City of Newport, defendant herein, and that he has knowledge of the facts alleged in the foregoing answer and that the allegations in said answer are true.

A. J. LIVINGSTON.

Subscribed and sworn to before me this 5 day of December, 1918.
[SEAL.]
LOUIS REUSCHER,
*Notary Public, Campbell Co., Ky.*

My Commission expires Jan. 18, 1920.

*Motion.*

Filed Dec. 14, 1918.

Now comes defendant, the City of Newport, and moves that this cause be set for trial at the term commencing January 13th, 1919.

BRENT SPENCE,
*Solicitor for Defendant.*

*Order.*

Entered & Filed Dec. 14, 1918.

On motion of the defendant it is now ordered that this case be and same is set for hearing at the special term of the court at Covington, on Friday, January 17th, 1919.

A. M. J. COCHRAN,
*Judge.*

December 14th, 1918.

29 ***Order.***

Entered & filed Jan. 17, 1919.

By agreement of parties, the court being advised, it is now ordered by the court that this cause be and same is continued and set for special hearing on Wednesday, January 29th, 1919.

A. M. J. COCHRAN,
*Judge.*

*Order.*

Entered & filed April 9th, 1919.

This day came the parties and by agreement, it is now ordered that this cause be submitted; and further that the parties herein be and they are allowed time in which to file briefs herein.

A. M. J. COCHRAN.

*Order.*

Entered & filed Oct. 30, 1919.

It is now ordered that this cause be and same is continued.

A. M. J. COCHRAN,
*Judge.*

*Order.*

Entered & filed April 5, 1920.

It is now ordered that time be given parties, plaintiff and defendant to brief and that sixty days thereafter be given for reply brief herein.

A. M. J. COCHRAN,
*Judge.*

30 *Opinion.*

Filed Oct. 16, 1920.

This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article 1 of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the City towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of Des Moines v. Des Moines City Ry. Co. 214 U. S. 179.

The cause is, therefore, dismissed for want of jurisdiction.

A. M. J. COCHRAN,
*Judge.*

Oct. 16, 1920.

*Decree.*

Entered & Filed October 18, 1920.

Came defendant and filed a motion that this cause be dismissed because this Court has no jurisdiction of the subject matter to which plaintiffs object, and the cause being submitted for final judgment upon arguments and briefs of counsel and the Court being
31 sufficiently advised it is adjudged and decreed that this Court is without jurisdiction and said motion to dismiss be and the same is hereby sustained and said cause is dismissed, and plaintiffs will pay the costs of this action, to which ruling of the Court the plaintiffs except.

A. M. J. COCHRAN,
*Judge.*

*Order.*

Entered & Filed Oct. 22, 1920.

Upon the Court's own motion, the entry of dismissal herein is set aside, on the ground that it was entered through error.

A. M. J. COCHRAN,
*Judge.*

October 22, 1920.

*Decree.*

Entered & Filed Nov. 4, 1920.

This cause came on to be heard upon the pleadings and the evidence and arguments of counsel, whereupon the court finds that the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same.

Wherefore it is ordered, adjudged and decreed that for the reason that this court is without jurisdiction of the cause the same is hereby dismissed at plaintiffs' costs; to which plaintiffs except
32 and give notice of appeal to the Supreme Court of the United States.

A. M. J. COCHRAN,
*Judge.*

Nov. 4, 1920.

*Assignment of Errors.*

Filed Nov. 4th, 1920.

Now come the plaintiffs and respectfully submit that in the proceedings and in the final judgment of the District Court of the Eastern District of Kentucky in the above entitled cause there is manifest error in this, to-wit:

1. The court erred in holding that it is without jurisdiction of the matters and things set out in the original bill.

2. The court erred in holding that the resolution of the defendant referred to in said bill does not impair the obligation of plaintiffs' contracts set forth in said bill.

3. The court erred in holding that the said resolution of defendant does not contemplate any action on behalf of the City outside of the institution of legal proceedings.

4. The court erred in dismissing the cause on the ground that it is without jurisdiction thereof.

MATT HEROLD,
ERNST, CASSATT & COTTLE,
*Attorneys for Plaintiffs.*

33 *Bond on Appeal or Error.*

Filed Nov. 5, 1920.

Know all men by these presents:

That we, The South Covington & Cincinnati Street Railway Co. and The Suburban Electric Company as principals and The Ameri-

can Surety Company of New York as surety, are held and firmly bound unto The City of Newport, Kentucky, in the full and just sum of One Thousand Dollars, to be paid to the said The City of Newport *his* certain attorneys, legal representatives or assigns, to which payment well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 5th day of November in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at the October term of the District Court of the United States for the Eastern District of Kentucky, in a suit depending in said court, between The South Covington & Cincinnati Street Railway and The Suburban Electric Co., plaintiffs and The City of Newport, defendant, judgment was rendered against the said plaintiffs and the said plaintiffs having obtained an appeal to the Supreme Court at the time of the entry of the decree and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit.

Now the condition of this obligation is such that if the said South Covington and Cincinnati Street Railway and The Suburban Electric Company shall prosecute its appeal to effect and answer all damages and cost if it fail to make its plea good, then the above
34 obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

THE SOUTH COVINGTON & CINTI. ST. RY. CO.
THE SUBURBAN ELECTRIC CO.
MATT HEROLD,
ERNST, CASSATT & COTTLE,
*Attys.*
AMERICAN SURETY COMPANY OF NEW YORK,
By U. J. HOWARD,
*Res. V. Pres.,*
By ED. E. WALKER,
*Res. Ass't Sec.*

Approved by
A. M. J. COCHRAN
*Judge of the U. S. District Court,*
*Eastern District of Kentucky.* [SEAL.]

*Certificate.*

Filed Nov. 5, 1920.

I hereby certify that the judgment of dismissal herein is based solely on the ground that the matters and things set out in the pleadings herein do not present a controversy arising under the Constitution or laws of the United States and that this court is without jurisdiction of the same.

A. M. J. COCHRAN,
*Judge.*

Nov. 5, 1920.

*Order Allowing Appeal.*

Entered & Filed Nov. 5, 1920.

The plaintiffs herein having given notice of appeal in open court at the time of the entry of the decree herein, and having filed
35 their assignment of errors herein, it is ordered that an appeal to the Supreme Court of the United States from the decree herein be and the same is hereby allowed.

It is further ordered that the restraining order and temporary injunction heretofore entered herein be continued in force during the pendency of said appeal.

The amount of the bond is fixed at $1,000 and the bond presented by plaintiffs in said amount with American Surety Company of New York as surety is hereby approved.

A. M. J. COCHRAN,
*Judge.*

Nov. 5, 1920.

*Præcipe for Record on Appeal.*

Filed Nov. 15, 1920.

To the clerk:

Please make up the record for appeal herein, including all pleadings, filings, and orders, but excluding all depositions, briefs, and subpœnas.

MATT HEROLD,
ERNST, CASSATT & COTTLE.
*Solicitors for Plaintiffs.*

*Acknowledgment of Service.*

Newport, Kentucky, November, 1920.

Service of the foregoing præcipe is acknowledged and the undersigned consents and agrees that the foregoing constitutes a sufficient and proper record.

BRENT SPENCE,
*Solicitor for Defendant.*

36 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
*Eastern District of Kentucky, ss:*

I, J. W. Menzies, Clerk of the United States District Court, for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing 35 pages contain a true and correct copy of the record, as per præcipe, and stipulation filed herein in the matter set

out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said Court, at Covington, Ky., this 20 day of December, A. D. 1920, and of the Independence of the United States of America the 145 year.

[Seal of U. S. District Court East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
*Clerk.*

Endorsed on cover: File No. 28,044. E. Kentucky D. C. U. S. Term No. 687. The South Covington & Cincinnati Street Railway Company and The Suburban Electric Company, appellants, vs. The City of Newport, Kentucky. Filed January 18th, 1921. File No. 28,044.